

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

MCDONALD'S USA, LLC

Respondent.

No. 1:16-mc-00321-P1

**McDONALD'S USA, LLC'S OPPOSITION TO NATIONAL LABOR RELATIONS  
BOARD'S MOTION FOR AN ORDER TO COMPEL PRODUCTION OF DOCUMENTS  
REQUIRED BY ADMINISTRATIVE SUBPOENA *DUCES TECUM***

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### INTRODUCTION

Ordinarily, NLRB cases do not involve pre-trial discovery. *See, e.g., Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990) (“[p]re-trial discovery, perhaps the primary source of delay in civil actions, is almost never allowed by the [B]oard”). Unbound by normal Board procedure, the General Counsel continues to manufacture discovery disputes, despite being 49 days, 26 witnesses, and over 1,500 exhibits into his direct case in his underlying administrative trial. Here, the General Counsel seeks to move the Court to compel McDonald’s USA, LLC (“McDonald’s” or “Company”) to produce 22 documents, withheld as privileged, pursuant to Special Master Jeffrey D. Wedekind’s<sup>1</sup> deeply flawed June 28, 2016 Order (“Order”)<sup>2</sup> finding that McDonald’s waived privilege as to 94 of 102 documents logged on McDonald’s February 15, 2016 privilege log because of supposed inadequacies in the log entries. Following the Order, McDonald’s produced 72 of the subject documents in the evidently vain hope that doing so would resolve the issues created by the Order.

Although McDonald’s has complied with the General Counsel’s onerous discovery demands to the extent required by law, the General Counsel now asks this Court to facilitate the continuation of his mid-trial discovery demands by finding that McDonald’s has waived privilege over, and compelling McDonald’s to produce, the remaining 22 documents. In doing so, the General Counsel misrepresents the nature of McDonald’s August 8, 2016 privilege log, misrepresents McDonald’s detailed privilege log descriptions, and makes an entirely unsupported assertion that he is somehow prejudiced by not having these 22 documents – again, despite already using over 1,500 exhibits to question 26 witnesses for a combined 49 days of trial.

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<sup>1</sup> On April 15, 2016, Administrative Law Judge Wedekind was appointed as a Special Master to adjudicate the privilege dispute between McDonald’s and the General Counsel.

<sup>2</sup> The Order is attached hereto as Exhibit 1.

For these reasons, more fully explained below, the Court should deny the General Counsel's motion ("Motion") to compel production of the 22 disputed documents.

### **BACKGROUND**

#### **I. The SEIU's Corporate Campaign Against the Quick-Service Industry**

Since 2012, the Service Employees International Union (hereinafter "SEIU") has mounted a corporate campaign targeting a number of quick-service restaurant brands, while focusing on the McDonald's brand. The most visible aspect of that campaign has been a series of SEIU-organized protests at McDonald's restaurants – overwhelmingly staffed by individuals with no connection to any McDonald's-branded restaurant and frequently marred by violence – in support of legislation to raise the minimum wage. As part of its corporate campaign, the SEIU began flooding McDonald's franchisees with garden-variety unfair labor practice charges, with the first charge being filed in New York City in November 2012.

Only franchisees have been charged; McDonald's is "not accused of having committed any unfair labor practices." See General Counsel's April 26, 2016 Motion Seeking Production of Privileged Documents, Ex. 2 at 20 (emphasis added). The SEIU's charges against the franchisees would be unremarkable but for one thing: the SEIU used them as a vehicle to repeatedly allege that McDonald's is a joint employer of its franchisees' employees. That, however, is a position that contradicts decades-old Board law, as well other federal laws (such as the Lanham Act) and the law of every state in the Union. See, e.g., *Love's Barbecue Rest.*, 245 NLRB 78, 117 (1979) (rejecting the General Counsel's invitation to rewrite joint employment law to "encompass a full analysis of the financial relationship between franchisor and franchisee"); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725, 732-34, 739 (Cal. 2014) (noting the "sound and legitimate

reasons for business format contracts like the present one to allocate local personnel issues almost exclusively to the franchisee”).

## II. The General Counsel’s Investigation and the Present Litigation

McDonald’s has never been found to be a joint employer in any forum.<sup>3</sup> But in July 2014, the General Counsel issued a press release stating that he intended to pursue substantive unfair labor practice claims against various franchisees, as well as the SEIU’s joint employer theory against McDonald’s. Nearly six months later, Regional Directors in NLRB Regions 2, 4, 13, 20, 25, and 31 issued separate complaints against the charged franchisees in their respective Regions and alleging that McDonald’s was a joint employer with the charged franchisees. In January 2015, all six of the complaints were transferred to NLRB Region 2 in New York, then consolidated for all purposes.

The proceedings before the Board are the largest and most far-reaching in NLRB history. The consolidation involves more than 60 separate unfair labor practice charges (and 181

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<sup>3</sup> See, e.g., *Evans v. McDonald’s Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991) (McDonald’s USA not liable to franchisee’s employee because there was “no common management, no centralized control of labor relations, and no common ownership or financial control” between McDonald’s USA and franchisee); *Gray v. McDonald’s USA, LLC*, 874 F.Supp.2d 743, 749-53 (W.D. Tenn. 2012) (ruling for McDonald’s USA because there was no common management between McDonald’s USA and the franchisee and McDonald’s USA did not retain the ability to “hire, fire or discipline an employee”); *Dudley v. 4-McCar-T, Inc.*, No. 7:09-cv-00520, 2011 WL 1742184, at \*3-4 (W.D. Va. May 4, 2011) *aff’d*, 458 Fed. App’x. 235 (4th Cir. 2011) (ruling for McDonald’s USA because franchisee “control[led] all of the employment related matters at the restaurant, including hiring and supervising, setting and paying wages, withholding employment taxes, assigning jobs, promoting and demoting and determining work schedules”); *Catalano v. GWD Mgmt. Corp.*, No. CV 403-167, 2005 WL 5519861, at \*4-6 (S.D. Ga. Mar. 30, 2005) (McDonald’s USA and franchisee are not joint employers, noting that McDonald’s USA did not have the right to control hiring and firing of employees); *Alberter v. McDonald’s Corp.*, 70 F.Supp.2d 1138, 1144 (D. Nev. 1999) (McDonald’s USA not liable to employee of franchisee because McDonald’s USA and franchisee lacked sufficient interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control); *Dotson v. McDonald’s Corp.*, No. 97 C. 1833, 1998 WL 164871, at \*3 (N.D. Ill. Mar. 31, 1998) (dismissing claims against McDonald’s USA brought by franchisee’s employee); *Kennedy v. McDonald’s Corp.*, 610 F. Supp. 203, 205 (S.D. W. Va. 1985) (ruling for McDonald’s USA on claim by franchisee’s employee because franchisee retained power to hire, fire, and discipline plaintiff without needing to consult franchisor); see also *Parmenter v. J & B Enters.*, 99 So.3d 207, at ¶ 4 (Miss. App. 2012) (McDonald’s USA did not control day-to-day operations of the franchise), *cert. denied*, 98 So.3d 1073 (Miss. 2012).

unrelated alleged violations of the Act) filed in six NLRB Regions over a span of 22 months.<sup>4</sup> It implicates 30 different restaurants owned by 21 different independent franchisees in five states, each with its own ownership, management, supervision, and employees – and with nothing even allegedly in common among them beyond a franchise relationship with a common franchisor.

Although the General Counsel investigated the SEIU’s joint employment claims for more than two years, the Consolidated Complaint is entirely conclusory as to his joint employment theory. In that regard, the Complaint alleges only: (1) that there is a franchise agreement between McDonald’s and each franchisee; and (2) that, in some unstated fashion, the Company “possessed and/or exercised control over the labor relations policies” of each franchisee. *See* Complaint, Ex. 3 at ¶¶5, 16, 25, 32, 41, 47, 55, 63, 69, 75, 86. The Complaint alleges no substantive facts as to the Company. Thus, it contains no description of what McDonald’s and/or the charged franchisees did to create a supposed joint-employer relationship, much less the joint employer theory under which the General Counsel intends to proceed.

Finally, as noted above, although it has long been the law that “[p]re-trial discovery, perhaps the primary source of delay in civil actions, is almost never allowed by the [B]oard,” the General Counsel was afforded extensive pre-trial discovery in this case. *See, e.g., Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990). More specifically, in February of 2015, the General Counsel issued a massive subpoena to McDonald’s focused almost exclusively on joint employment issues. This “trial subpoena” consisted of seven single-spaced pages of instructions, followed by 118 separate demands for information. In addition, the General Counsel issued largely duplicative subpoenas to each of the 30 charged franchisees.

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<sup>4</sup> The 60 separate charges involved in this case represent only a fraction of the charges that the SEIU has filed against McDonald’s franchisees and McDonald’s as part of its campaign against the McDonald’s brand. As of the date of the complaints in this case, the SEIU had filed approximately 240 such charges in more than 20 Regions of the NLRB. Also by the date of the complaints, the Regions had dismissed 130 of those charges.

McDonald's, on the other hand, has been denied essentially any discovery whatsoever. *See* Administrative Law Judge Esposito's Orders Granting Petitions to Revoke, Exs. 4, 5, and 6. Notwithstanding its scope, McDonald's has fully complied with the subpoena to the extent required by law, *see infra* at 5-6.

### **III. McDonald's Compliance with the General Counsel's Subpoena**

Despite strong objections to much of the General Counsel's subpoena to the Company, in spring of 2015 McDonald's began producing documents in response to the General Counsel's subpoena. During a June 23, 2015 hearing before Administrative Law Judge Esposito, McDonald's informed the General Counsel of the scope of its anticipated production and its position on three outstanding discovery issues. Notwithstanding the massive scope of the subpoena, by September 2015, McDonald's, working diligently internally and with its vendor, had substantially completed the anticipated scope of its production, incurring by then costs of more than \$1 million for litigation support vendors alone. The General Counsel's response to this production was to file a subpoena enforcement action in the Southern District of New York, on September 30, 2015, over three months after the June 23, 2015 hearing. McDonald's opposed the General Counsel's petition. *See* McDonald's USA, LLC's October 26, 2015 Opposition to the General Counsel's Application for an Order Requiring Obedience to Administrative Subpoena, Ex. 7.

Judge McMahon of this Court largely agreed with the Company's positions. This Court: (i) rejected the General Counsel's request that McDonald's produce documents in the custody or control of third parties; (ii) rejected the General Counsel's demand that McDonald's produce text messages and documents contained in personal email accounts or cellphones; and, (iii) substantially sided with the Company on the issue of producing ESI from additional custodians

by rejecting the General Counsel's demand that the Company produce from 59 new individuals and instead ordering McDonald's to add 24 new custodians. *See NLRB v. McDonald's USA, LLC*, Case No. 15-mc-322 (CM), at \*19, 25-26 (Hearing Transcript, Oct. 30, 2015), Ex. 8. Judge McMahon additionally noted that "it looks from the bench" as if "all [the General Counsel] is trying to do is beat up on McDonald's." *Id.* at \*15.

McDonald's complied with Judge McMahon's order.<sup>5</sup> Nevertheless, the General Counsel continued his attempts to manufacture discovery disputes. For its part, McDonald's continued its efforts to reach a global resolution of all discovery issues. For example, even after producing ESI from the additional custodians ordered by Judge McMahon, the Company voluntarily agreed to produce responsive ESI from the work emails of 12 additional custodians in hopes of putting all discovery issues to rest. *See* Letter from J. Linas to J. Rucker (Jan. 8, 2016), Ex. 9 ("I emphasize that the Company is under absolutely no obligation to do this. Rather, it is doing so strictly as a sign of its continued good faith, and in the perhaps vain hope that the General Counsel will begin to adopt reasonable positions with respect to other issues.").<sup>6</sup> In all, McDonald's has produced (to date) over 300,000 pages of documents, now having incurred approximately \$2 million in costs from litigation support vendors alone.<sup>7</sup>

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<sup>5</sup> The General Counsel asserts (Motion at 19-20) that McDonald's failed to meet a November 30, 2015 "deadline" for such compliance. That statement is a misrepresentation. Judge McMahon did not impose any deadline, but rather ordered McDonald's to use "best efforts" to complete the additional production. *See* Ex. 8 at \*26.) Indeed, the Judge imposed the "best efforts" obligation in response to McDonald's statement – at the hearing before Judge McMahon – that it was not realistic to expect the additional production to be complete by November 30. *See id.* at \*21. In all events, McDonald's did use best efforts with respect to its production, and thus it fully complied with Judge McMahon's order.

<sup>6</sup> Specifically, the Company agreed to produce ESI from an additional 4 custodians in its January 8, 2016 letter and an additional 5 custodians during a January 28, 2016 meet and confer. At the January 28, 2016 meet and confer, the Company also voluntarily agreed to produce additional documents on a subject matter that the General Counsel requested.

<sup>7</sup> For the first time since the underlying administrative litigation began, in a status conference before ALJ Esposito on September 21, 2016, the General Counsel acknowledged that he was seeking a joint employment finding only as to the 30 restaurants that are the subject of the Consolidated Complaint, as opposed to the

#### IV. McDonald's USA's Privilege Claims and Privilege Logs

To be sure, there are certain documents that the Company has withheld from production on the basis of privilege.

- In full compliance with a January 4, 2016 Order from Administrative Law Judge Esposito, McDonald's provided the General Counsel with a detailed privilege log on January 8, 2016. *See* Order Denying General Counsel's Motion for an Order Finding Waiver of Privilege (Jan. 4, 2016), Ex. 10.
- On January 21, 2016, the Company issued a revised privilege log to the General Counsel, adding descriptions for documents inadvertently left off the initial log. *See* McDonald's USA, LLC's Privilege Log (Jan. 21, 2016), Ex. 11. Nevertheless, the General Counsel soon began raising challenges to the sufficiency of McDonald's privilege log.
- Seeking a global resolution of all discovery disputes, on January 28, 2016, the Company met and conferred with the General Counsel and, at the General Counsel's request, agreed to revisit certain of its privilege designations. *See* Letter from W. Goldsmith to J. Rucker (Jan. 25, 2016), Ex. 12; Letter from J. Rucker to W. Goldsmith (Feb. 10, 2016), Ex. 13.
- On February 15, 2016, in the spirit of compromising and hopefully ending the dispute, the Company produced 128 documents it originally withheld as privileged. *See* Letter from J. Linas to J. Rucker Enclosing Revised Privilege Log (Feb. 15, 2016), Ex. 14.

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(continued...)

approximately 13,000 McDonald's operated franchisee restaurants in the United States. This underscores the extent to which the discovery the General Counsel has already obtained far exceeds what is reasonable and necessary for him to pursue his now much smaller case. Further, the General Counsel cannot credibly assert that the documents at issue here are even arguably necessary to be produced, much less that he is somehow prejudiced should he not obtain them.

- Additionally, despite disagreeing with the General Counsel’s position regarding the appropriateness of its privilege log descriptions, McDonald’s provided the General Counsel with an amended privilege log containing even more detailed descriptions of the remaining documents over which it asserted privilege (“February 15<sup>th</sup> Privilege Log”).<sup>8</sup> *See id.* Yet the General Counsel’s complaints continued unabated.
- As a result, on March 3, 2016, McDonald’s again met and conferred with the General Counsel regarding his stated concerns. At that meeting, McDonald’s agreed, among other things, to provide the General Counsel with exemplars of certain categories of privileged documents (subject to the General Counsel’s agreement that this act would not waive privilege) to assure the General Counsel of the propriety of the Company’s privilege designations. Additionally, McDonald’s proposed turning over additional documents – which it continued to believe were properly privileged – in exchange for a global settlement of all privilege and discovery issues. *See* Letter from J. Linas to J. Rucker (Mar. 25, 2016), Ex. 16.
- The General Counsel rejected the proposal. *See* Letter from J. Rucker to W. Goldsmith (March 31, 2016), Ex. 17.
- On April 26, 2016, the General Counsel filed a motion before Special Master Wedekind seeking an order finding that McDonald’s waived privilege as to certain documents on the basis of alleged deficiencies in McDonald’s February 15<sup>th</sup> Privilege Log and requiring immediate production of those documents (“General Counsel’s April 26<sup>th</sup> Motion”),<sup>9</sup> Ex. 2.

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<sup>8</sup> McDonald’s February 15<sup>th</sup> Privilege Log is attached hereto as Exhibit 15.

<sup>9</sup> The full title of the General Counsel’s April 26<sup>th</sup> Motion is General Counsel’s Motion for an Order Requiring Immediate Production of Certain Documents Withheld by McDonald’s USA as Privileged and for Additional Production of Documents to Cure McDonald’s Failures to Preserve Relevant Evidence, Especially Electronically Stored Information.

- On May 16, 2016, in an effort to limit the issues before Special Master Wedekind and after concluding that a number of the remaining documents simply were not worth fighting about, McDonald's voluntarily produced 272 additional documents that it had withheld as privileged.
- Additionally, in order to facilitate the General Counsel's understanding of the documents that remained at issue, McDonald's provided the General Counsel with an amended privilege log ("May 16<sup>th</sup> Privilege Log"), which had been revised only by eliminating entries for those documents produced in their entirety, and modifying a small number of privilege designations for documents produced with redactions on May 16, 2016. No descriptions were revised in any manner between the February 15<sup>th</sup> and May 16<sup>th</sup> privilege logs. *See* May 16<sup>th</sup> Privilege Log, Ex. 18.
- On June 28, 2016, Special Master Wedekind issued an Order finding that McDonald's waived privilege as to 94 of 102 challenged documents, including the 22 documents at issue before this Court, and held that the General Counsel's subpoena required McDonald's to produce these documents. *See* Order, Ex. 1 at 54.
- In yet another effort to avoid further litigation, on August 8, 2016 McDonald's produced 72 of the 94 documents subject to Special Master Wedekind's Order despite fundamental errors in the Order's legal analysis and findings. *See* Letter from W. Goldsmith to J. Rucker et al. (Aug. 8, 2016), Ex. 19.
- McDonald's updated the privilege log to remove the 72 documents that had been produced on August 8, 2016 ("August 8<sup>th</sup> Privilege Log").<sup>10</sup> Contrary to the General Counsel's

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<sup>10</sup> McDonald's August 8<sup>th</sup> Privilege Log is attached hereto as Exhibit 21.

assertion, (Motion at 14-17), McDonald's August 8<sup>th</sup> Privilege Log was not revised in other any manner.

- Subsequently, on August 31, 2016, the General Counsel filed the instant Motion.
- Following McDonald's August 8, 2016 production of documents, there remain only 22 privileged documents at issue before the Court, which are reflected at February 15<sup>th</sup> Privilege Log entries: 104, 184,<sup>11</sup> 282, 287, 304, 305, 336, 340, 364, 376, 578, 603, 607, 612, 613, 636, 637, 648, 649, 656, 657, and 658.<sup>12</sup>

### **ARGUMENT**

In his Motion, the General Counsel argues that McDonald's waived its privilege claims as to the 22 documents at issue before the Court. He contends – in a general sense – that McDonald's privilege log entries for the disputed documents are deficient. He asks that this Court: (1) adopt Special Master Wedekind's findings and/or incorrect legal conclusions that McDonald's has waived its privilege claims over the 22 challenged documents; and (2) order McDonald's to produce these 22 documents. The General Counsel's positions are meritless. First, the Court cannot adopt the Special Master's findings and/or legal conclusions regarding privilege waiver because only district courts may evaluate claims of privilege in compelling document production pursuant to an agency subpoena. Second, McDonald's privilege log entries for the 22 disputed documents are more than complete and provide sufficient detail to establish McDonald's privilege claims over these documents. Accordingly, the Court should deny the General Counsel's Motion.

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<sup>11</sup> Special Master Wedekind ruled that McDonald's description for entry 184 was sufficient with respect to the first and second emails and attachments, but insufficient with respect to the third email and attachments.

<sup>12</sup> A compilation of these entries is attached hereto as Exhibit 20.

# **I. The Court Must Review *De Novo* McDonald’s Claims of Privilege Over the 22 Challenged Documents**

In ordering McDonald’s to produce documents pursuant to the Subpoena, the Court must first make its own determinations regarding McDonald’s privilege claims over the challenged documents because the Board lacks authority to enforce subpoenas. The Board is empowered to issue subpoenas “requiring the attendance and testimony of witnesses or the production of any evidence.” 29 U.S.C. §161(1). But the Board has no independent power to enforce such subpoenas. Rather, subpoena enforcement is left to “district court[s] of the United States,” which “have jurisdiction to issue . . . an order requiring” production of evidence. 29 U.S.C. §161(2). This “structural limitation on the NLRB’s authority” is a requirement of “the Constitution’s separation of powers.” *NLRB v. Interbake Foods LLC*, 637 F.3d 492, 498 (4th Cir. 2011). Whether a witness before an agency “is bound to . . . produce books, papers, etc., in his possession . . . is [a question] that cannot be committed to a subordinate administrative or executive tribunal for final determination.” *Id.* at 497–98 (quoting *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447, 485 (1894)). “Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.” *Id.*

For this same reason, only a district court may “evaluate[] . . . claims of privilege” (including, if necessary, through “in camera review”). *Interbake Foods*, 637 F.3d, at 498 (noting “the court cannot delegate its task of conducting an in camera review to an ALJ”). “Because a respondent’s claim of privilege is the basis for refusing to produce documents in response to subpoena, it is inherent in carrying out the judicial function of deciding whether to enforce the subpoena to resolve the respondent’s challenge to the subpoena.” *Interbake Foods*, 637 F.3d, at 499; *see also NLRB v. Detroit Newspapers*, 185 F.3d 602, 606 (6th Cir. 1999) (holding that “the

district court, not the ALJ, must determine whether any privileges protect the documents from production”); *N.L.R.B. v. Int’l Medication Sys., Ltd.*, 640 F.2d 1110, 1115–16, 1116 n.6 (9th Cir. 1981) (stating that “challenges to agency subpoenas must be resolved by the judiciary before compliance can be compelled” and that “a federal agency lacks authority to make a ‘final determination’ whether a witness is ‘bound’ to produce subpoenaed documents”); *Nat’l Labor Relations Bd. v. Sanders-Clark & Co.*, No. 216-CV-02110CASA FMX, 2016 WL 2968014, at \*3-5 (C.D. Cal. Apr. 25, 2016) (holding that ALJ Esposito lacked authority to issue an order finding that a franchisee waived privilege and stating “[t]hat question [of privilege] rests solely in the hands of the district courts”). Thus, in adjudicating whether McDonald’s must produce the 22 challenged documents, the Court must evaluate *de novo* McDonald’s claim of privilege as to each document; the Court cannot accept the findings and/or legal conclusions of Special Master Wedekind.

## **II. The General Counsel’s Argument Regarding McDonald’s August 8, 2016 Privilege Log Has no Basis in Fact**

The General Counsel devotes three pages of his Motion to the wholly baseless argument that McDonald’s has made “constantly shifting privilege claims” and engaged in “gamesmanship” by producing a revised privilege log to the General Counsel on August 8<sup>th</sup> 2016. (Motion at 14-17). The General Counsel argues that the Court should “decline to consider” the “new details in support of McDonald’s privilege claims” set forth in the August 8<sup>th</sup> Privilege Log because such privilege log is “untimely.” (*Id.* at 15.) But McDonald’s did not revise a single description, privilege claim, or revise any substantive information in its August 8<sup>th</sup> Privilege Log. *See supra* at 9. Rather, McDonald’s sole revisions to its August 8<sup>th</sup> Privilege Log were limited to removing entries for those documents produced on August 8, 2016. *See supra* at 9. Accordingly, the privilege log entries for the 22 disputed documents do not differ in any material way from

McDonald's February 15<sup>th</sup> and August 8<sup>th</sup> Privilege Logs.<sup>13</sup> Furthermore, McDonald's produced the August 8<sup>th</sup> Privilege Log to the General Counsel solely to facilitate the General Counsel's understanding of the documents that remained at issue. *See supra* at 9.

The General Counsel's argument is similarly misleading because it disregards the substance of the revisions to McDonald's privilege log made in January and February of 2016. First, the General Counsel concedes, (Motion at 5), that McDonald's did not revise the descriptions set forth in its privilege log at any time other than in its February 15<sup>th</sup> Privilege Log. *Supra* at 8-9. Second, McDonald's made these February 15<sup>th</sup> revisions only to accommodate the General Counsel's request for a revised privilege log and as part of a genuine effort to resolve the ongoing privilege dispute. *Supra* at 7-8. As part of this effort, on February 15, 2016, McDonald's also voluntarily produced 128 documents previously included on its privilege log. *Supra* at 7.<sup>14</sup> In short, the General Counsel's argument is entirely without factual support. The General Counsel's misrepresentation of the facts regarding McDonald's modification to the August 8<sup>th</sup> Privilege Log appears to be an effort to obfuscate the substantive issues – namely, the General Counsel's meritless challenges to McDonald's fully-supported privilege claims over the 22 documents.

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<sup>13</sup> The privilege designation for the document reflected at privilege log entry 336 was revised from WP/CI to AC on the May 16<sup>th</sup> Privilege Log because the document was produced to General Counsel with redactions at that time. There are no other differences between the 22 challenged entries on the February 15<sup>th</sup> and August 8<sup>th</sup> Privilege Logs.

<sup>14</sup> As to McDonald's January 8, 2016 privilege log, the General Counsel's argument that this log was untimely because it was not produced by November 30, 2016 is misleading and misconstrues the content of Judge McMahon's order. Judge McMahon ordered McDonald's to use "best efforts" to produce the "work e-mails" of 24 additional custodians. *See* Ex. 8, at \*25-26. The order did not impose any requirements regarding the production of a privilege log. *Id.* McDonald's provided this log to the General Counsel in full compliance with a January 4, 2016 Order from Administrative Law Judge Esposito. *Supra* at 7. On January 21, 2016, McDonald's amended this privilege log only to the extent of adding entries that had inadvertently not been included on January 8, 2016. *Supra* at 7.

### III. McDonald's Privilege Log Entries are Undeniably Complete and Clearly Establish Privilege as to the 22 Challenged Documents

To assert attorney-client privilege, a party must establish (1) a communication between a client and counsel; (2) intended to be, and kept, confidential; and (3) made for the purpose of obtaining legal advice. *See U.S. v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). To invoke work product privilege, a party must generally show that a document was prepared principally or exclusively to assist in anticipated or ongoing litigation. *Id.*

McDonald's has sufficiently established privilege over the remaining 22 documents.<sup>15</sup>

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<sup>15</sup> While McDonald's chose not to exercise its right to take a special appeal of Special Master Wedekind's Order, it disagrees strongly with Special Master Wedekind's analysis and findings. For example, Special Master Wedekind's order states that privilege log entry 657's title and entry are "too vague or conclusory to evaluate the attorney-client claim." The description for entry 657, put before this court by the General Counsel, reads:

Email between McDonald's Counsel, L. Kistler, Esq. (Senior Counsel), E. Brown, Esq. (Managing Counsel), M. Calabrese (HR Director), and S. Monahan (Business Consultant), reflecting confidential communication between counsel and client for the purpose of giving legal advice regarding IT collection for anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals, as well as state and regulatory investigations/actions and potential proactive litigation.

*See Ex. 15.* Entries 336, 578, and 612, set forth below, are similarly representative of the level of detail somehow found to be "too vague or conclusory" by Special Master Wedekind.

Emails reflecting information collected by McDonald's personnel about October 15th labor activity at direction of McDonald's legal counsel (both McDonald's Labor Legal and Morgan Lewis) because of anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals, as well as state and regulatory investigations/actions and potential proactive litigation and distributed to owner-operator Recipients who share a common interest in such anticipated or pending litigation and regulatory investigations/actions and email seeking legal review by McDonald's in-house counsel B. Rawitz, Esq. re same. Ex. 15, at entry 336.

Email and attachment from N. DeBruin to S. Fine, Esq. seeking legal advice concerning strategic action regarding union activity and reflecting strategic action re union activity as well as health care reform prepared at the direction of McDonald's legal counsel (both McDonald's Labor Legal and Morgan Lewis) because of anticipated and/or pending litigation alleging joint employment, including federal and state court litigation and unfair labor practice charges, by the SEIU and its affiliated organizations and/or individuals, as well as state and

The General Counsel asserts that McDonald's privilege log contained insufficient detail. But it is hard to imagine how McDonald's could have provided more detail. Under the Federal Rules, a party withholding a document because of a claim of privilege must only describe the nature of the documents withheld in a manner that "will enable other parties to assess the claim," but does not "reveal[] information itself privileged or protected." Fed. R. Civ. P. 26(b)(5)(A).<sup>16</sup> This is simply a "notice" requirement, designed to "reduce the need for in camera examination of the documents." Advisory Committee Notes to Rule 26 (1993). The "rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection," and the Rules Committee has expressly recognized that less detail may be warranted in cases (such as this one) that involve massive document productions:

Details concerning time, persons, general subject matter, etc. *may* be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."

*Id.* (emphasis added).

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(continued...)

regulatory investigations/actions and potential proactive litigation. Ex. 15, at entry 578.

Email string including McDonald's Counsel, D'Angelo, Esq. (General Counsel West Division), and S. Plotkin (President West Division) reflecting confidential communication between counsel and client for the purpose of giving legal advice and containing attorney's mental impressions, conclusions, opinions, or theories regarding ULP claims. Ex. 15, at entry 612.

Each of the subject 22 privilege log entries contains a similar level of detail, identifying the subject matter and purpose of the communication. *See* Ex. 15. How the Special Master could conclude that the language was "vague" with respect to substance is difficult to grasp. Notwithstanding the Special Master's incorrect analysis, and despite being under no obligation to do so, McDonald's produced the documents identified in 72 of the 94 privilege log entries subject to Special Master Wedekind's Order, in another attempt to resolve the ongoing, mid-trial discovery sought by the General Counsel.

<sup>16</sup> As the General Counsel acknowledges, (Motion at 9-15), the Federal Rules of Civil Procedure are appropriately used as guides for Board practice. *See Brinks, Inc.*, 381 N.L.R.B. 468, 468-69 (1986).

Consistent with these principles, the Second Circuit has held that all a party must do in its privilege log is provide “sufficient detail to permit a judgment as to whether the document is *at least potentially protected from disclosure.*” *Constr. Prods. Research, Inc.*, 73 F.3d at 473 (emphasis added).<sup>17</sup>

To require more information would be to put McDonald’s in the contradictory position of having to risk its privilege in order to preserve it. *See Scott v. Chipotle Mexican Grill, Inc.*, 94 F.Supp.3d 585, 600-01 (S.D.N.Y. 2015) (privilege log entries were “sufficiently detailed to give the plaintiffs adequate notice of the underlying claims of privilege” where entries, ranging between 15-30 words, provided plaintiffs with the type of document; general subject matter; author; addressees; recipients; and the privilege asserted). *See also Orenshteyn v. International Business Machines Corp.*, No. 02 Civ. 5074(JGK)(RLE), 2013 WL 208902, at \*1 (S.D.N.Y. Jan. 15, 2013) (finding privilege log entries such as “request for legal advice re issuance of patent and infringement by IBM” sufficiently detailed); *Go v. Rockefeller University*, 280 F.R.D. 165, 175 (S.D.N.Y. 2012) (finding privilege log entries describing subject matter of document withheld as privileged sufficiently detailed where the entries, consisting of 6-19 words, adequately described the nature of the document).

Each disputed entry includes a detailed description of the document’s subject matter and purpose for which it was created.<sup>18</sup> For each privilege log entry, McDonald’s has provided

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<sup>17</sup> Similarly, the Board has suggested that a privilege log should identify each document covered by the privilege, and include “(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipients of the document.” *CNN America, Inc.*, 353 N.L.R.B. 891, 899 (2009); *see also* National Labor Relations Board Division of Judges, BENCH BOOK: AN NLRB TRIAL MANUAL 64 (October 2015) (quoting *CNN America*).

<sup>18</sup> The General Counsel argues that email attachments must be “separately identified and described in sufficient detail to evaluate the claim.” (See Motion at 12 n.11.) This is incorrect. *See, e.g., Scott*, 94 F.Supp.3d at 599-600 (upholding privilege over privilege log entries that combined emails and attachments); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 641-42 (D. Nev. 2013) (where plaintiffs argued that each email within a chain, and each

(1) the nature of the document; (2) the date the document was created; (3) the document's title, or email's subject line; (4) the document's author(s), including their job titles; (5) the document or email's recipient(s), including their job titles; (6) the privilege asserted; and (7) a comprehensive description of the privileged material. *See* Ex. 15. McDonald's descriptions of the documents are more than sufficiently detailed. On average, each description is 63 words long. The shortest description, entry 364, consists of 37 words<sup>19</sup> – still far longer than, and at least as detailed as, the entries that were found sufficiently detailed in *Scott*, *Orenshteyn*, and *Go*.

Furthermore, each contested description establishes the necessary elements of the privilege invoked. Entries withheld pursuant to the work product privilege (104, 184, 304, and 305) explain that the documents were created because of anticipated litigation, with specificity as to the type of litigation expected. *See* Ex. 15. Likewise, descriptions for documents withheld pursuant to attorney-client privilege (entries 336, 340, 364, 376, 603, 612, 613, 636, 637, 648, 649, 656, 657, and 658) make clear that they were prepared for the purpose of seeking legal review, and that the recipients are attorneys. *Id.* Entries withheld pursuant to both the attorney-client and work product privileges (282, 287, 578, and 607) assert that the emails and

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(continued...)

attachment, required separate privilege log entries, Court held otherwise and did not require the defendant to provide separate log entries or explanations for each separate email or for each attachment). Furthermore, this was not a basis upon which Special Master Wedekind found that entries were insufficient. *See* Order, Ex. 1 at 20 (finding entries 133 and 134 – including both emails and attachments – to be sufficient).

<sup>19</sup> Privilege log entry 364 reads:

Email between L. Garcia (Interim Communications Manager), and McDonald's Counsel, T. Miller, Esq. (Senior Counsel-Global Labor & Employment Law), reflecting confidential communication between counsel and client for the purpose of seeking legal advice regarding upcoming labor protests.

Ex. 15, at entry 364. Thus, even the shortest privilege log entry challenged by the General Counsel clearly supports McDonald's claim of attorney-client privilege over the document because it details that the recipient was an attorney and that the email was sent for the purpose of seeking legal advice regarding labor protests.

attachments within the string were sent and/or created for the purpose of seeking (or giving) legal advice, and prepared because of anticipated litigation. *Id.*

The General Counsel argues that the descriptions are vague, and challenges McDonald's use of phrases like "confidential communications," "strategic action," "reflecting attorney mental impressions," and "giving or seeking legal advice." *See* Motion at 18. McDonald's use of such language is substantially similar to privilege log entries that have been found sufficient in other cases. *See, e.g., Orenshteyn*, 2013 WL 208902, at \*1 (finding that entry described as "request for legal advice re issuance of patent and infringement by IBM" was sufficiently detailed); *Scott*, 94 F.Supp.3d at 600 (finding that entry described as "discussion of meeting with John Shunk and legal advice concerning classification of Chipotle's Apprentice position," was sufficiently detailed). For these reasons, McDonald's February 15<sup>th</sup> Privilege Log establishes privilege as to each of the 22 challenged documents and the Court should reject the General Counsel's request for production of these documents.

#### **IV. The General Counsel Cannot Establish Prejudice by Not Having Received the Documents at Issue**

The General Counsel has not attempted to articulate how he has been prejudiced by not having the documents in question. He offers nothing more than conclusory statements in support of his prejudice argument. *See* Motion at 20 (arguing that the General Counsel was prejudiced for no reason other than being "denied . . . the ability to examine and use the documents at issue here while witnesses have been testifying"). To date, McDonald's has produced over 300,000 pages of documents. The General Counsel has already introduced 1,500 exhibits to question 26 witnesses for a combined 49 trial days, with some witnesses – Troy Bretthauer, Danitra Barnett, Wendell Sconiers, Diana Thomas, Maggie Calabrese, Michael Lewis, and Craig Cary – testifying, typically over McDonald's objections, for three or four days per person. The General

Counsel has had no shortage of documents to use over the past five months, and does not claim that he was denied documents involving witnesses that have been called to testify. Perhaps, more likely, the General Counsel is still unsure of exactly what he is looking for. Simply put, the General Counsel is disappointed that he has not found any evidence to sufficiently support his joint employment theory as to only 30 of approximately 13,000 McDonald's franchisee operated restaurants in the United States, notwithstanding McDonald's and the charged franchisees' massive and costly document production. *See supra* note 7.

### **CONCLUSION**

For the foregoing reasons, the General Counsel's request for an Order finding waiver of privilege, and compelling McDonald's to produce documents identified in the 22 above-referenced privilege log entries should be denied.

Dated: September 29, 2016

Respectfully submitted,

/s/ Willis J. Goldsmith

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of September, 2016, a copy of the foregoing McDonald's USA, LLC's Opposition to National Labor Relations Board's Motion for an Order to Compel Production of Documents Required by Administrative Subpoena *Duces Tecum* was served by ECF and e-mail to the following attorneys for Petitioner:

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